No. __

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, respondent-appellees also include William Kimes, Individually and in his Official Capacity as General Manager of Ball State University's Banquet and Catering Department; Saundra Davis, Individually and in her Official Capacity as a Supervising Employee of Ball State University's Banquet and Catering Department; Karen Adkins, Individually and official capacity as the Assistant Director of Administration, Personnel, and Marketing for the Residence Hall Dining Service at Ball State University; and Connie McVicker, Individually.

TABLE OF CONTENTS

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Miscellaneous: **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit, App., *infra*, 1a, is reported at 646 F.3d 461. The district court's unpublished memorandum and order granting the respondent's motion for summary judgment, App., *infra*, 25a, is available at 2008 WL 4247836.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2011. On August 16, Justice Kagan granted an extension of time to file a petition for a writ of certiorari until October 31. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (a) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part:

> An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

Equal Emp't Opportunity Com'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, App., *infra*, 81a.

STATEMENT

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that when an employee subject to severe or pervasive sex- (or race-) based workplace harassment sues her employer under Title VII, the employer is vicariously liable for the discriminatory conduct of the worker's "supervisors," but that liability for harassment by a "co-employee" requires proof of employer negligence. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Since then, the lower federal courts have staked out starkly divergent rules for when the *Faragher* and *Ellerth* vicarious liability rule applies. Following circuit precedent, the decision below held that it applies only to a subset of supervisors, those with authority to alter the victim's formal employment status, *i.e.*, to hire, fire, promote, or discipline, and that an individual who has the title of manager, functions as the plaintiff's boss, oversees her work, and assigns her daily tasks is, for these purposes, a mere "co-worker." While two other federal courts of appeals have adopted the Seventh

Circuit's rule, three others, along with numerous district courts and the United States Equal Employment Opportunity Commission, have squarely rejected it. Those courts (and the EEOC) have concluded that the restriction is unsupported by—and indeed irreconcilable with—the holding and reasoning of *Faragher* itself and, in the words of a Seventh Circuit judge, at odds with the concern for "workplace reality" that has been a touchstone of this Court's Title VII case law.

The Court should grant review here to settle the acknowledged conflict over this important question of federal law and correct the entrenched but spurious misreading of *Faragher* and *Ellerth*.

A. Statutory Background

Title VII protects employees from, *inter alia*, workplace discrimination on the basis of race or sex. 42 U.S.C. § 2000e-2(a). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), this Court first recognized that sex-based harassment in the workplace is actionable under Title VII. *Id.* at 67.[1] The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 66. In *Harris* v. *Forklift Systems, Inc.*, 510

[1] Although *Meritor* and subsequent cases involved sex-based discrimination, it explained that lower "[c]ourts [had] applied this principle to harassment based on race * * * [and] [n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited." 477 U.S. at 66; accord *Ellerth*, 524 U.S. at 767-768.

U.S. 17 (1993), and *Oncale* v. *Sundowner Offshore Services*, 523 U.S. 75 (1998), the Court laid out the principal requirements for a hostile work environment claim: (1) that the race- or gender-based harassment be "severe or pervasive"; (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Harris*, 510 U.S. at 21-22.

In *Faragher* and *Ellerth*, the Court considered the standards that should govern "employer responsibility" in such cases. The Court established three distinct rules. First, for cases where a supervisor's harassment of a subordinate is accompanied by a tangible adverse employment action, the Court held, in agreement with most of the lower courts, that strict liability should apply. *Faragher*, 524 U.S. at 790-791; *Ellerth*, 524 U.S. at 762-763. Second, for cases where no tangible action is taken and the harassing employee is the victim's co-worker, the Court likewise endorsed the view of most lower courts—that employer liability requires proof of negligence, a combination of "knowledge and inaction." *Faragher*, 524 U.S. at 789, 806-807; *Ellerth*, 524 U.S. at 760.

Third, and most notably, the Court held that a different rule governs when no tangible adverse action was taken but the harassment was that of the victim's "supervisor." *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. Rejecting lower court decisions that had imposed a negligence standard, the Court looked to the agency principles that Congress intended to inform Title VII generally, and, in particular, the "aided in authority" principle of the

Restatement (Second) of Agency § 219 (1957), and explained, "a harassing supervisor is always assisted in his misconduct by the supervisory relationship." *Faragher*, 524 U.S. at 802. Accordingly, in the absence of "tangible employment action," *id.* at 806, employers are "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over [her]"—but allowed to make out an affirmative defense "compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ibid.*

B. Facts and Proceedings Below[2]

This case arises from a decision of the Seventh Circuit holding, as a matter of law, that the employer respondent here, Ball State University, could not be liable for the racial harassment and intimidation to which petitioner Maetta Vance, the sole African-American employee in the University's

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[2] Because this case was decided on motions for summary judgment, the courts below were required (as this Court would be) to "draw all reasonable inferences in favor of the nonmoving party," *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); to disregard any evidence supporting Ball State that the jury would not be required to credit; and to refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Ibid.*

Banquet and Catering Department, was subjected in her workplace.

In 2005 Saundra Davis, a salaried employee whom Ball State designated as a "supervisor," was assigned to the Catering Department and given authority to direct Vance's and other employees' work. App., *infra*, 54a. During a previous stint in the department, Davis had physically assaulted Vance, who had reported it to her supervisor at the time, but did not pursue a formal complaint when Davis was transferred out. *Id.* at 18a.

Davis and Connie McVicker, another white employee, created an environment of physical intimidation and racial harassment. Davis threatened Vance, cornering her on an elevator and telling her, "I'll do it again." App., *infra*, 30a. She used epithets like "Buckwheat" and "Sambo" to refer to Vance and felt comfortable doing so in the presence of Vance and other employees. *Id.* at 6a. For her part, McVicker regularly used the term "n****r" to refer to both Vance and African-American students at the University and openly boasted of her family's connections to the Ku Klux Klan. *Id.* at 3a. Both Davis and McVicker stared menacingly at Vance, leaving her afraid to be alone with them in the kitchen. *Id.* at 37a n.8.

As this behavior persisted, Vance lived and worked in a constant state of fear. She sought psychiatric treatment for anxiety and sleeplessness. Pet. Summ. J. Br. 7-8 (No. 1:06-cv-1452-SEB-JMS). The University's incident reports described Vance as "sitting on the edge of her seat" and "shaking violently" as she recounted her treatment by Davis

and McVicker. Pet. Summ. J. Br. Exh. 10 (No. 1:06-cv-1452-SEB-JMS).

When Vance reported particular instances of the harassment to the University's Compliance Office, that office repeatedly assigned Bill Kimes, the general manager of Vance's department, to investigate. Kimes had himself long mistreated Vance. The first time she had introduced herself to him, Kimes had refused to shake Vance's hand. App., *infra*, 3a. Kimes also regularly excluded Vance from workplace activities, waiting until she left to invite her white coworkers to lunch. *Ibid.* Indeed, respondents expressly conceded that Kimes was abusive, telling the Seventh Circuit that he was "very, very rude" and "ruled by intimidation." Resp. C.A. Br. at 6. They denied only that he singled out Ms. Vance for particularly harsh treatment. *Ibid.*[3]

Little was done as the result of Kimes's "investigations." Kimes never imposed discipline on Davis (who denied Vance's account of the elevator incident), instead counseling both Davis and Vance to "respect" each other in the workplace. App., *infra*, 6a. After numerous white employees corroborated Vance's reports about McVicker's racist tirades, the University issued McVicker, whom they concluded had repeatedly lied to investigators, a (confidential) letter of reprimand. *Id.* at 16a. Because the University had no formal policy concerning racial

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[3] Petitioner presented evidence—sworn statements of fellow employees—that Kimes's abuse of Vance in fact was worse than his mistreatment of the nonminority employees the University identified. Pet. C.A. Br. at 11.

harassment—unlike a lengthy and detailed "zero tolerance policy" addressed to sex-based harassment, Pet. C.A. Br. at 12—McVicker's letter referenced a generic rule prohibiting "conduct which is inconsistent with proper behavior." App., *infra*, 34a. Although the University had responded forcefully to previous incidents of gender- and sexual-orientation harassment, Pet. Summ. J. Br. 5 (No. 1:06-cv-1452-SEB-JMS), the University refused Vance's request that McVicker be assigned to another department and continued to schedule them to work together—though later explaining that Kimes had "tried" to avoid doing so. *Id.* at 36a.

Although the reprimand letter indicated that McVicker risked more serious sanctions if she continued to direct racist epithets at Vance, she called Vance a "monkey" the day the letter was issued. When Vance reported this to Kimes, he discouraged her from "proceeding further" with a complaint, explaining that a "she said-she said exchange * * * wouldn't result in anything positive." App., *infra*, 35a. This concern for corroboration did not obtain when Vance was accused: when Davis alleged that Vance had splashed pots and pans in her presence, Kimes issued Vance a verbal warning without further investigation. *Id.* at 8a. Indeed, email exchanges obtained in discovery showed University "investigators" fretting over whether Vance would enlist the aid of the NAACP or the Urban League or would form an "alliance" with other African-American employees. Pet. Summ. J. Br. Exh. 14 (No. 1:06-cv-1452-SEB-JMS).

The harassment did not abate even after Vance complained to the EEOC or after this action was

filed. Davis approached Ms. Vance, taunting her and saying, in a Southern accent, "you scared?" App, *infra*, 7a. Nor did McVicker relent: she cornered Vance and said, "payback." *Id.* at 37a. Still later (after motions had been filed), Davis and her daughter accosted Vance on the University campus, with the daughter saying: "You are a n****r, a f***ing n****r. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* at 44a. When Vance told Kimes about her encounter with Davis and her family, he told Vance to "get out of [his] face," *id.* at 45a, and did nothing.

When the University's newspaper posted articles describing Vance's lawsuit on its website, it occasioned numerous overtly racist and threatening comments. One commenter wrote that Vance should go "back to the east side and sell some crack," and another suggested that Davis should "[b]ait [Vance] into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self-defense." App., *infra*, 46a n.13. The University kept these offensive messages on the website after petitioner asked that they be taken down.

Vance sued, alleging hostile environment and retaliation claims under Title VII.[4] The district court granted Ball State's motion for summary judgment, concluding, *inter alia*, that the evidence

[4] The retaliation claim, which arose, *inter alia*, from the increasingly unpleasant and menial work assignments Vance was given after complaining, was dismissed below, and is not the subject of this petition.

raised no triable issue as to Title VII employer responsibility for Vance's work environment.

The court first concluded that, whether or not Davis "had authority to direct the work of [Vance and] other employees," App., *infra*, 54a, she lacked what the Seventh Circuit precedent established to be the *sine qua non* of "supervisor" status under *Farager* and *Ellerth*, "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 53a (citing *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). The court then held that as a matter of law Vance's claim could not succeed under the negligence standard applicable to co-employee harassment.

In so holding, the court addressed a dispute between the parties as to whether evidence of post-filing incidents, such as the assault by the Davis family and the comments on the newspaper website, were properly before it. After expressly stating that "even if [the court] were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim," App., *infra*, 51a, the court agreed with Ball State that the submissions should be disregarded for failure to comply with Fed. R. Civ. P. 15(d), the rule governing supplemental pleadings.

The Seventh Circuit affirmed the judgment. The court assumed that Vance had carried her burden with respect to three of the four elements of her hostile environment claim: "(1) that [the employee's] work environment was both objectively and

subjectively offensive; (2) that the harassment was based on her race; and (3) that the conduct was either severe or pervasive." App., *infra*, 11a. But the Seventh Circuit upheld the district court as to the sufficiency of the "basis for employer liability." *Ibid.*

The court rejected the argument that Davis's conduct should attributed to Ball State under the *Faragher*/*Ellerth* standard, explaining that circuit precedent limited that rule to harassment by supervisors with the "authority * * * 'to hire, fire, demote, promote, transfer, or discipline [their victim].'" App., *infra*, 12a (quoting *Hall*, 276 F.3d at 355). The opinion acknowledged that this restrictive rule had been rejected by other circuits and the EEOC's Enforcement Guidance and had been subject to criticism within the Seventh Circuit. *Ibid.* But the court explained that it was nonetheless binding law in the circuit.

As to negligence, the court upheld the lower court's conclusion, but identified two errors in its analysis. The court first explained that the district court had erred in considering the harassment evidence against Davis and McVicker separately, emphasizing "that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees." App., *infra*, 14a. Again emphasizing that a hostile work environment claim is premised on the "cumulative effect of individual acts," *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002), the court also rejected the conclusion that the post-filing evidence could be treated as "a disguised Rule

15(d) submission." App., *infra*, 9a. Despite this, the court declined to remand, observing that the district court had discretion to exclude the evidence "in the interest of keeping [the case] moving forward." *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and consequential question of federal law: whether *Faragher's* and *Ellerth's* rule that employers are vicariously liable under Title VII when "supervisors" engage in race- or sex-based workplace harassment applies only to misconduct by personnel who have power over their victim's formal terms of employment. Adhering to circuit precedent, the court below so held. In doing so, however, the court acknowledged that other courts and the EEOC reject this rule. App., *infra*, 12a-13a. This Court should review the decision to settle this broad and entrenched conflict and correct the Seventh Circuit's significant misreading of *Faragher* and *Ellerth*.

I. THE LOWER COURTS ARE SHARPLY DIVIDED AS TO WHEN THE FARAGHER/ ELLERTH VICARIOUS LIABILITY RULE APPLIES

Although *Faragher* and *Ellerth* announced that significantly different rules should apply to discriminatory harassment by "supervisors" and "co-employees" (and held the cases before the Court governed by the "supervisor" rule), they did not define "supervisor" or explicitly instruct lower courts as to when vicarious liability is triggered. "The definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts."

Browne v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 912 (E.D. Tenn. 2003); accord App., *infra*, 12a-13a (acknowledging circuit split); *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 208 n.6 (3d Cir. 2011) (same); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (same). The Seventh Circuit and others have held that only a subset of supervisors—those with the power over the formal employment status of the subordinate they harass—are governed by the *Faragher*/*Ellerth* rule. Other courts have expressly rejected that restriction as incompatible with the result and reasoning of this Court's decisions and have instead held that the *Faragher*/*Ellerth* rule governs when the harasser has authority to direct and oversee his victim's daily tasks, irrespective of whether he is empowered to take ultimate action on the company's behalf. This split is sharp and widespread and shows no sign of abating.

A. Three Circuits Have Held The "Supervisor" Rule Is Restricted To Harassment By Those With Power Over Their Victim's Formal Employment Status

Six months after *Faragher* and *Ellerth*, the Seventh Circuit gave their rule a restrictive reach, holding that employers would be vicariously liable only for race or sex harassment by those supervisors possessing authority of "a certain magnitude" over their victim's employment terms, namely to make "consequential employment decisions," "primarily * * * the power to hire, fire, demote, promote, transfer, or discipline [him or her]." *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034-

1035 (7th Cir. 1998). Although the *Parkins* opinion was somewhat unclear about how restrictive it meant this "supervisor" definition to be, subsequent Seventh Circuit decisions have relied on it to hold that a harasser who directed the victim's daily work was merely a "co-employee." In *Hall* v. *Bodine Electric Co.*, the court declared that "the fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship." 276 F.3d at 355; see also *Rhodes* v. *Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). These decisions make clear that only harassment by an individual who has power over the formal employment status of his or her victim implicates the vicarious liability rule.

In published opinions, the First and Eighth Circuits have adopted this "power over formal employment status" view, see *Noviello* v. *City of Boston*, 398 F.3d 76, 96 & n.5 (1st Cir. 2005) (rejecting the "broader" Second Circuit definition); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (affirming district court's adoption of "the narrower standard of *Hall*"), as have the Third and Sixth Circuits in unpublished opinions, see *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 209 (3d. Cir. 2011); *Stevens* v. *U.S. Postal Serv.*, 21 Fed. Appx. 261, 263-264 (6th Cir. 2001), and numerous district courts.[5]

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[5] See, *e.g.*, *Browne*, 286 F. Supp. 2d at 912-918; *McPherson* v. *HCA-HealthOne, LLC.*, 202 F. Supp. 2d 1156, 1169 (D. Colo. 2002); *Olsen* v. *H.E.B. Pantry Foods*, 196 F. Supp. 2d 436, 439 (E.D. Tex. 2002).

While acknowledging that the basis for *Faragher*/*Ellerth's* vicarious liability rule is that "acts of supervisors have greater power to alter the environment than acts of co-employees generally," *Parkins*, 163 F.3d at 1033 (quoting *Faragher*, 524 U.S. at 805), these courts have emphasized the need to exclude "low level supervisors" and those with only nominal supervisory roles, reasoning that only authority of a "substantial magnitude" can be said to aid in the commission of harassment. *Ibid.* In drawing this line, these courts have looked to pre-*Faragher*/*Ellerth* cases addressing whether a manager was the employer's "agent," which had limited that status to those empowered to make "consequential decisions" about the victim's employment status and concluded that the same test—whether the harasser has authority to affect the "hire, fire, demote, promote, transfer, or discipline" the victim—should determine vicarious liability. *Id.* at 1034. "Without some modicum of this authority, a harasser cannot qualify as a supervisor" under *Faragher* and *Ellerth*. *Noviello*, 398 F.3d at 96.

B. Three Circuits And The EEOC Have Rejected The Seventh Circuit's Rule

The Second, Fourth, and Ninth Circuits, the Tenth Circuit in an unpublished opinion, and district courts of the Fifth and Eleventh Circuits have rejected the Seventh Circuit's restrictive rule, holding that harassment by personnel overseeing the victim's daily work assignments and performance, not just power over her formal employment status, warrants vicarious employer liability. In *Mack* v. *Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), cert.

denied, 540 U.S. 1016 (2003), the Second Circuit became the first court of appeals to reject *Parkins*. Holding vicarious employer liability warranted for harassment committed by a "mechanic in charge" who "exercised the authority to make and oversee the daily work assignments of the mechanics and the mechanics' helpers," the court concluded that the Seventh Circuit's rule, simply focusing on "whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates," was too narrow. *Id.* at 126. Citing guidelines on the subject issued by the EEOC as persuasive authority, the *Mack* court held that the proper inquiry under *Faragher* and *Ellerth* is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." *Id.* at 126-127.

The Fourth Circuit too has rejected *Parkins*. In *Whitten* v. *Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), that court announced that "the absence of the ability to take tangible employment actions does *not* foreclose the possibility that the harasser is the plaintiff's supervisor." *Id.* at 234 (emphasis in original). The court then concluded that vicarious liability governed, because the harasser "directed [the victim's] activities, giving her a list of tasks he expected her to accomplish" and "controlled her schedule." *Id.* at 246 (citing *Mack* favorably).[6]

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[6] Although some courts and commentators had read language in an earlier Fourth Circuit decision, *Mikels* v. *City of Durham*, 183 F.3d 323 (4th Cir. 1999), as placing

The Ninth Circuit's definition of supervisor parallels that of the Second and Fourth Circuits. In *McGinest* v. *GTE Service Corp.*, 360 F.3d 1106, 1119 n.13 (9th Cir. 2004), the court held that "the authority to demand obedience from an employee" makes a harasser a supervisor under *Faragher*/*Ellerth*. Relying on *McGinest*, the court in *Dawson* v. *Entek International*, 630 F.3d 928, 937 (9th Cir. 2011), held that a "trainer and immediate manager" of the victim could be a supervisor, even if the employer did not vest him with authority over the victim's formal employment status. See *id.* at 940.

In an unpublished opinion, the Tenth Circuit implicitly adopted the "power to direct" approach as well. *Smith* v. *City of Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir. 2003). There, the court held that "[b]ecause [the harasser] directed [the victim's] daily tasks * * * a reasonable jury could conclude that [he] was [her] supervisor." District courts of the Fifth and Eleventh Circuits have also followed this approach. See *Anderson* v. *Ultraviolet Sys., Inc.*, No. Civ.A.H-03-2873, 2005 WL 1840155, at *7 (S.D. Tex. July 25, 2005); *Dinkins* v. *Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001).

These courts have observed that restricting vicarious liability to harassment by those with power over their victim's formal employment status "would

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that court on the "power over formal employment status" side of the divide, see, *e.g.*, *Mack*, 326 F.3d at 126 n.5, the subsequent holding in *Whitten* forecloses that interpretation.

be inconsistent with the outcome in *Faragher*," because one of the lifeguards deemed a supervisor by this Court in that case plainly lacked such power. *Whitten*, 601 F.3d at 245 n.6. And a supervisor without hiring or firing authority, these courts reason, can still possess the "power and authority that [make the victim] vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker [does] not.'" *Id.* at 246 (quoting *Mikels*, 183 F.3d at 333). Accordingly, "the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test." *Mack*, 326 F.3d at 126.

As these courts have also recognized, their interpretation is consistent with that of the EEOC, the agency vested with significant responsibility for enforcing Title VII, educating employers about their statutory obligations, investigating Title VII complaints, and promoting their consensual resolution. In this capacity, the EEOC issues guidelines interpreting Title VII, which are "entitled to great deference." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). These "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Indeed, this Court expressly relied on the EEOC Guidelines in holding in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986), that harassment is a prohibited form of discrimination.

For more than a decade, the EEOC has understood "supervisor" in *Faragher* and *Ellerth* to include one who "has authority to direct the

employee's daily work activities." App, *infra*, 90a. Like the courts that have rejected the Seventh Circuit definition, the EEOC explains that because an individual's harassment and abuse of a subordinate is bolstered by authority over her work assignments and performance, the harassing individual should be treated as a supervisor, not a mere co-employee. *Id.* at 91a-92a.

The EEOC has filed briefs successfully urging courts of appeals to reject the "artificially limited" Seventh Circuit rule. EEOC Amicus Br. at 22, *Whitten*, 601 F.3d 231 (No. 09-1265); EEOC Amicus Br., *Mack*, 325 F.3d 116 (No. 02-7056); EEOC Amicus Br., *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (No. 02-3732). The *Mack* and *Whitten* courts were both persuaded by the EEOC.[7]

Although the Seventh Circuit continues to reject the EEOC's understanding of *Faragher*, App., *infra*, 13a, its restrictive definition of "supervisor" has been the subject of internal criticism. In *Rhodes*, a panel held that circuit precedent required that sexual harassment by personnel responsible for "assembling crews and assigning tasks to employees," be treated under the co-worker rule, because they lacked the power to "hire, fire, transfer, promote, demote, or discipline" the victim or other employees. *Id.* at 502, 506. This outcome led two members of the three-

[7] The Eighth Circuit in *Weyers* was foreclosed from adopting the EEOC's definition by *Joens* v. *John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), decided one month earlier. *Weyers*, 359 F.3d at 1056-1057.

judge panel to urge reconsideration of *Parkins*. *Rhodes*, 359 F.3d at 509-510. One criticized the Seventh Circuit's definition as "particularly narrow" and doubted that it "comport[ed] with the realities of the workplace." *Ibid.* (Rovner, J., concurring).

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The circuits are openly and deeply divided over the proper definition of supervisor and the domain for the vicarious liability rule. A harasser who directs and oversees the work of the victim but who lacks power over her formal employment status is a supervisor in some circuits but not in others.

II. THE SEVENTH CIRCUIT RULE IS WRONG

The Seventh Circuit has restricted the *Faragher* and *Ellerth* liability rule to harassment by only a subset of the individuals who are "supervisors" in common parlance—and in the eyes of their subordinates and employers—by excluding those with immediate responsibility for directing the day-to-day work of their victims unless they also have power to take "consequential employment" action against them. This arbitrary restriction of *Faragher* and *Ellerth* is unsupported by—and indeed contrary to—the holding and rationale of those decisions

The Seventh Circuit's narrow focus on high-level personnel wielding the power to take formal employment action is at odds with *Faragher*/*Ellerth's* formulation of the rule: the Court held an employer would be vicariously liable "for an actionable hostile environment created by a supervisor *with immediate (or successively higher)* authority over the employee."

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765 (emphasis added).

And as the EEOC and other courts have highlighted, the restrictive gloss that the Seventh Circuit has placed on *Faragher* cannot be reconciled with the result in *Faragher* itself. There, the Court held the City of Boca Raton vicariously liable for the hostile work environment created by David Silverman, who was "responsible for making [Faragher's] daily assignments, and for supervising [her] work and fitness training," but who had no authority to hire, fire, promote, demote, discipline, or transfer her. *Faragher*, 524 U.S. at 781. Indeed, the Court saw the liability issue as so clear that it directed that judgment be entered for the plaintiff on remand. *Id.* at 809.

But even if the specific facts underlying the Court's "supervisor" designation in *Faragher* could be disregarded, but see *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion are to be taken in connection with the case in which those expressions are used"), the restriction the Seventh Circuit has read into *Faragher* and *Ellerth* "[does] violence to the *rationale*" of those decisions. *Grozdanich* v. *Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (emphasis added).

In *Faragher* and *Ellerth*, the Court held that (subject to the narrow affirmative defense) employers are liable under Title VII for supervisors' actionable harassment. Grounding its reasoning in the "aided in authority" principle of the Restatement (Second) of Agency § 219 (1957), the Court identified

two principal ways in which supervisory authority aids harassers: (1) supervisory authority enables harassers "to keep subordinates in their presence while they make offensive statements," and (2) harassers can "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Faragher*, 524 U.S. at 801. In these ways, a supervisor's abusive behavior "necessarily draw[s] upon his superior position over the people who report to him, or those under them," such that "an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker." *Id.* at 803.

Both the primary concerns motivating the Court's adoption of the vicarious liability rule—the harasser's enhanced ability to command his victims' presence and to retaliate against victims who resist—are directly implicated when the harasser has the authority to direct his victim's daily work activities, whether or not he also has the authority to make formal employment decisions. Indeed, this is illustrated by the facts of *Faragher*. The Court held Boca Raton vicariously liable for Silverman's discriminatory misconduct because he had been "'granted virtually unchecked authority'" over the plaintiff and other female lifeguards, "'directly controlling and supervising all aspects of Faragher's day-to-day activities.'" 524 U.S. at 808 (quoting *Faragher* v. *City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., concurring in part and dissenting in part)) (brackets omitted). Silverman's ability to retaliate against his victims in no way depended on his ability to make ultimate employment decisions, as illustrated by his

proposition to the plaintiff: "Date me or clean toilets for a year." *Faragher*, 524 U.S. at 780.

The Court did not consider this authority insufficient because Silverman lacked the power to make formal personnel decisions. *Faragher*, 524 U.S. at 808 (holding the defendant vicariously liable for Silverman's conduct). As *Faragher* demonstrates, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees," but rather include "the day-to-day supervision of the work environment." *Meritor*, 477 U.S. at 76 (Marshall, J, concurring). Yet under the Seventh Circuit's restricted reading of *Faragher*, employers are insulated from liability for harassment by immediate supervisors like Silverman, who exert great employer-conferred authority over their victims' day-to-day work lives, but lack the ultimate authority to make the employment decisions required by *Parkins*. But "[i]n both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong." *Ibid.*

Strict application of the Seventh Circuit rule produces perverse consequences in a world in which large employers with "multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters": the rule simply "does not comport with the realities of the workplace." *Rhodes*, 359 F.3d at 510 (Rovner, J., concurring). Not only does it produce "the practical, if unintended effect of insulating employers from liability for harassment perpetrated by" the managers who actually direct

most employees' daily activities, *ibid.*, but the Seventh Circuit rule also inexplicably reserves vicarious liability to those within internal personnel departments who, far from having special power to "keep subordinates in their presence," *Faragher*, 524 U.S. at 801, have almost no contact with the workers whose employment terms they are empowered to alter.

Such context-blind rigidity places the Seventh Circuit rule in plain tension with this Court's pragmatic approach to Title VII. The Court has long recognized that Title VII should be construed with "common sense," *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 70 (2006), and an eye toward workplace reality. Thus, there is more to Title VII's coverage than the "terms and conditions" of employment "in the narrow contractual sense," *Faragher*, 524 U.S. at 786, for "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 81-82. In light of these considerations, the Court has repeatedly rejected unrealistic and mechanical bright-line tests for standards phrased "in general terms" where the "[c]ontext matters." *Burlington Northern*, 548 U.S. at 69; see, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997) (recognizing that employers may unlawfully retaliate against former as well as current employees); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002) (recognizing that acts occurring outside the statutory time period may nevertheless contribute to a hostile

work environment that existed within the statutory time period).

Burlington Northern is especially instructive because, in dealing with the problem of retaliation—a central concern motivating the *Faragher* and *Ellerth* rule—the Court rejected rigid rules limiting application of the Title VII anti-retalition provision to "ultimate employment decisions," 547 U.S. at 67, and instead adopted a standard reaching those actions "a reasonable employee" would have found to be "materially adverse." *Id.* at 68. As the Court observed, "[c]ommon sense" indicates that abusing the authority to direct daily work activities—such as by "insist[ing] that [the victim employee] spend more time performing the more arduous duties and less time performing those that are easier or more agreeable"—is "one good way to discourage an employee * * * from bringing discrimination charges." *Id.* at 70-71. That same power can prevent a victim from effectively responding to her supervisor's harassment, just as it can be wielded to retaliate against a victim who has already reported discrimination.

The courts that have adopted the Seventh Circuit rule have failed to produce a convincing rationale for their restriction of *Faragher* and *Ellerth*. Some have raised concern that the Second Circuit and EEOC interpretations of *Faragher* and *Ellerth* are insufficiently determinate. See, *e.g.*, *Browne* v. *Signal Mountain Nursery*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003). But as the Second, Fourth, and Ninth Circuits, the EEOC (and this Court in *Faragher*) have demonstrated, it is certainly possible to determine whether a harasser is a supervisor

without resorting to an enumeration of formal personnel powers. And courts and employers in jurisdictions applying the *Parkins* test regularly determine supervisory status according to a multi-factor analysis for purposes of the National Labor Relations Act. See 29 U.S.C. § 152(11); *N.L.R.B.* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001). Such concerns, moreover, rest on the erroneous premise that designating fewer harassers as supervisors and more harassers as co-workers simplifies "employer responsibility" determinations. In fact, determining supervisory status under a broader test arguably reduces the complexity of determining employer liability under *Faragher* and *Ellerth* by enabling courts and employers to avoid the complex and fact-intensive co-worker negligence inquiry altogether.

Some proponents of the Seventh Circuit rule have speculated that a less restrictive definition of supervisor would erode employers' incentive "to engage in preventive forethought," see, *e.g.*, *Browne*, 286 F. Supp. 2d at 914—as if employers would respond to the prospect of vicarious liability for harassment by front-line managers by giving up on the project of combating workplace harassment altogether. Such an irrational response would not only place them in violation of longstanding EEOC policy—which requires employers to "take all steps necessary to prevent sexual harassment from occurring," 29 C.F.R. § 1604.11—but would also vastly increase their liability exposure, given the central role that implementation of preventive policies plays under both the co-employee and supervisor harassment regimes.

III. THIS CASE PROVIDES A DIRECT OPPORTUNITY TO SETTLE AN ISSUE OF FAR-REACHING IMPORTANCE

The issue presented here—whether a harasser must have power over the formal employment status of the victim to be a "supervisor"—is of large legal and practical significance. At present, whether an employee subjected to severe racial and sexual harassment by her direct supervisor is able to obtain relief under Title VII will often depend on the circuit in which the conduct occurred. For example, the harassers in *Rhodes*, responsible for "assembling crews and assigning tasks to employees," 359 F.3d at 502, could be supervisors in circuits that use the "power to direct" definition. "[W]hatever formal employment authority they lacked, a factfinder reasonably might conclude that the power * * * given [to] them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment for [the victim]." *Id.* at 510 (Rovner, J., concurring) (citing *Mack*, 326 F.3d at 126). And the harasser in *Mack*, who lacked "'the power to hire, fire, demote, promote, transfer, or discipline,'" 326 F.3d at 126 (quoting *Parkins*, 163 F.3d at 1034), would not be a supervisor in circuits such as the Seventh that demand this power.

These differing rules have important consequences. The plaintiff in *Rhodes* was unable to raise even a triable question under the negligence standard, 359 F.3d at 507, while the lower court decisions in *Mack*—and for that matter, *Faragher*—were reversed with instructions that plaintiffs be granted judgment as a matter of law. *Mack*, 326 F.3d at 127; *Faragher*, 524 U.S. at 810. Indeed, as

this case itself illustrates, establishing employer responsibility based on negligence can be especially difficult as a practical matter: the unrepresented and legally unsophisticated employee was faulted both for complaining too much and not enough, while the employer's administrators, well-versed in employment law litigation, were able to "build a record" of impressive-seeming but hollow "investigations." In contrast, Ball State would have no realistic prospect of prevailing under the limited affirmative defense *Faragher* provides for "supervisor" harassment cases: Ms. Vance reported instances of Davis's harassment numerous times, App., *infra*, 3a-7a, so any argument that she took insufficient steps to avoid harm would be very unlikely to succeed.

These issues are no small matter. During the twelve-month period ending September 30, 2010, 14,543 employment discrimination cases were filed in United States courts—the third-largest category of civil cases, behind prisoner petitions and asbestos claims. Table C-2. U.S. District Courts–Civil Cases by Jurisdiction and Nature of Suit, U.S. Courts, 146 (Sept. 2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02Sep10.pdf. And in 2010 alone, the EEOC received more than 30,000 harassment charges. EEOC, Charge Statistics–FY 1997 through FY 2010, available at http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm. Employers agree that this issue is "an important and recurring issue of federal law." Pet. for Cert., *Mack* v. *Otis Elevator Co.*, No. 03-229, at 12. In the modern workforce, where many acts of

discrimination are committed by intermediate-level individuals in a large hierarchical organization such as Ball State University, resolution of this issue will undoubtedly add clarity to a great many employment discrimination disputes.

This case presents an excellent opportunity to settle this important issue. The definition of supervisor used by the Seventh Circuit determined the outcome below. The lower courts considered the employer's liability only under the negligence standard, and not under the vicarious liability standard. App., *infra*, 15a. Because the affirmative defense under *Ellerth* and *Faragher* will be unavailable to Ball State, Ms. Vance may prevail if Davis is determined to be a supervisor.

This issue is now ripe for review. Six courts of appeals have already defined supervisor in this context, and they remain committed to their differing positions, so nothing more would be gained by allowing further percolation of this issue. Resolution by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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